United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-6054
75-6055

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P/S

To be argued by
H. ELLIOT WALES

In The

United States Court of Appeals

For The Second Circuit

LUIS A. LEBRON, JR.,

Appellant,

vs.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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LUIS A. LEBRON, JR.,

Docket #75-6054
#75-6055

Appellant, :

-against-

UNITED STATES SECRETARY OF THE AIR FORCE, :

Appellee.

----------X

APPELLANT LEBRON'S BRIEF

Appellant Luis Lebron appeals to this court from the order of District Judge Milton Pollack denying his two applications for collateral attack upon military court martial convictions (#74 Civil 4942; #74 Civil 4943.)

A timely notice of appeal with respect to each matter has been filed.

This appeal does not present any problems as to the jurisdiction of the federal court. All military court proceedings have been completed, and Judge Pollack found that both matters were properly before the district

court. This application does not present any problem with regard to "custody", nor does it present any factual disputes. We accept the factual basis of the opinion of Judge Pollack and of the opinion of the Court of Military Review.

The first court martial (February 1971) involved Lebron's conviction for possession and using a narcotic drug, in violation of Article 134 of the Uniform Code of Military Justice. He received a six month sentence, which has long since been served.

In April 1971 the office of the Judge Advocate General, United States Air Force, examined the record of trial, and found it to be supported in law. The Judge Advocate General directed that there be no review of the proceedings of the trial by the Court of Military Review. Docket ACM 20846. As such the collateral attack was properly brought in the district court, as Judge Pollack so found.

The second court martial (December 1971) involved a conviction of Lebron of assault upon a fellow service man, after a jury trial, at the Keesler Air Force Base, Mississippi, in violation of Article 128 of the Uniform Code of Military Justice. The Court imposed a three year sentence. On March 22, 1972, the commanding officer at the Keesler Base approved the conviction of judgment and sentence.

On January 4, 1973, the United States Air Force Court of Military Review affirmed the judgment of conviction and sentence. The opinion of the Court is reported at 46 CMR 1062. On March 26, 1973, the United States Court of Military Appeals denied Lebron's petition for a grant of review of the decision and opinion of the United States Air Force Court of Military Review. 46 CMR 1323.

Lebron was in actual custody when proceedings were first begun in the district court.

OPINIONS BELOW

The opinion of District Judge Milton Pollack is set forth in full in the appendix (1a-20a). Also substantial portions of it will be quoted in the discussion of the several legal issues involved.

The opinion of the United States Air Force Court of Military Review, with regard to the assault charge, is reported at 46 CMR 1062.

The decision (without opinion) of the United States Court of Military Appeals, with regard to the assault charge, is reported at 46 CMR 1323.

There is no military court opinion or decision with respect to the narcotic case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Fifth Amendment right to due process, the Sixth Amendment right to a jury trial, and the Fourth Amendment right to protection against unreasonable search and seizure.

Also involved in this appeal are several statutory provisions of the Uniform Code of Military Justice, to be found in Title 10 of the United States Code.

Article 134 of the UCMJ (10USC 934) - the general article prohibits and punishes, as follows:

> "...all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces...".

Article 128 of the UCMJ (10 USC 928) prohibits and punishes assault.

Article 73 of the UCMJ (10USC 873), labeled petition for a new trial, speaks solely of a petition "after approval by the convening authority".

Article 63 of the UCMJ (10USC 863) states that "if the convening authority disapproves the findings and sentence of a court martial he may...order a rehearing".

The Uniform Code of Military Justice just does not have a provision comparable to Rule 33 of the Federal Rules of Criminal Procedure, which rule permits the trial court to consider an application for a new trial prior to the entry of a judgment of conviction. The Court of Military Review was obviously correct when it stated that the Code of Military Justice"...is silent as to the method by which he can obtain relief before the first review." 46 CMR at 1065.

THE NARCOTIC CONVICTION

In the General Court Martial Order of February 17th, 1971 (See 37a-38a), the language of the charge and the specifications are set forth as follows:

> "CHARGE: Violation of the Uniform Code of Military Justice, Article 134.
>
> SPECIFICATION 1: In that airman Luis A. Lebron, Jr. ... wrongfully had in his possession some amount of the habit forming drug, to wit, heroin.
>
> SPECIFICATION 2: In that airman Luis A. Lebron, Jr.... wrongfully used a habit forming drug, towit, heroin."

POINT ONE

ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONAL AS IT APPLIES TO LEBRON'S CONVICTION FOR POSSESSION AND USE OF A NARCOTIC DRUG

General Court Martial Order #3, dated February 17, 1971, of the Keesler Air Force Base, Mississippi, recites that Lebron was convicted of violating Article 134 of the Uniform Code of Military Justice in that he did possess and use a narcotic drug. 37a-38a.

Article 134 of the Uniform Code of Military Justice (10USC 934) recits in its entirety:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature tobring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and desgree of the offense, and shall be punished at the discretion of that court."

The Supreme Court of the United States sustained the constitutionality of Article 134 as it pertained to both Avrech and Dr. Howard Levy. See Secretary of the Navy v. Avrech, 418 U.S. 676, 94 S. Ct. 3039; Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547.

Of course we cannot and will not quarrel with the opinions of the High Court in these two cases. However, a reading of both opinions shows that the Supreme Court sustained the constitutionality of Article 134 (and Article 133) as it applied to conduct which was peculiarly military, and not otherwise capable of statutory definition. The High Court opinion evidenced that it did not wish to sustain the statute as it applied to conduct which was essentially a common law offense or a civilian offense, and which was capable of definition.

In this regard in Parker v. Levy, the Supreme Court wrote (417 US at____ 94 S.Ct. at_____):

> "The difference noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more activities of the more tightly knit military community. In civilian life there is no legal sanction-civil or criminal-for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer. The Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties:"
>
> ******
>
> "The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the Articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. It would be idle to pretend that there are not areas within the general confines of the Articles' language which have been left vague despite these narrowing

constructions. But even though sizable areas of uncertainty as to the coverage of the Articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage. Dynes v. Hoover, supra. And there also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both Articles clearly apply without vagueness or imprecision. It is within that range that appellee's conduct squarely falls, as the Court of Appeals recognized:"

A look at the table of contents of subchapter X, entitled Punitive Articles, which includes Articles 77 to 134 (IOUSC 877-934) shows that the Uniform Code of Military Justice prohibits and penalizes murder, manslaughter, larceny, robbery, forgery, arson, extortion, assault, burglary, perjury, fraud, and a host of other offenses well known to the civilian world.

The existence of these articles shows that Congress specifically intended to prohibit certain common law or civilian offenses, and addressed itself to that problem. As such it is evident that in enacting Article 134 Congress was not concerned with misconduct which was well known and easily specified by civilian standards, but was addressing itself to the multitude of conduct which could arise solely within the context of the military.

It was that type of conduct which the Supreme Court sustained in the Avrech and Levy opinions. It cannot be said that the Supreme Court addressed itself to all possible aspects of the application of Article 134 in sustaining the constitutionality of that article. In fact the converse really follows. The Court made it clear it was concerned with basically military conduct and not conduct which could just as easily have taken place in a civilian community. As such Article 134 constitutionally just cannot apply to the possession and use of

a narcotic. The High Court did not intend to extend Article 134 that far. The general finding of unconstitutionality of the Court of Appeals is still valid, and should be applied to this case.

In his opinion sustaining Article 134 as it applied to Lebron's narcotic conviction, Judge Pollack quoted from the concurring opinion of Justice Blackmun in Parker v. Levy, 417 U. S. at 763, in which Justice Blackmun stated that drug offenses are "of a sort which ordinary soldiers know, or should know, to be punishable". See page 3, Judge Pollack's opinion. However, none of Justice Blackmun's eight colleagues joined him in his concurring opinion, nor did the majority opinion make any reference to Justice Blackmun's thought that narcotic offenses are well within the ambit of Article 134. It is fair to infer that the majority opinion took note of the concurring opinion, and saw fit for deliberation not to adopt or incorporate its views. As such it was inappropriate for Judge Pollack to rely upon the single view of Justice Blackmun when the eight other members of the High Court saw fit not to join him in this regard. A ruling of the majority opinion makes clear that the High Court just did not see Article 134 as being directed towards narcotic offenses.

POINT TWO

IN THE ASSAULT CASE LEBRON WAS DENIED DUE PROCESS WHEN HIS APPLICATION FOR A NEW TRIAL WAS NOT REFERRED TO THE TRIAL JUDGE, AND WAS DENIED BY THE STAFF JUDGE ADVOCATE EX PARTE AND WITHOUT AN EVIDENTIARY HEARING

Shortly after the completion of the assault trial, Lebron filed an application for a new trial based upon newly discovered evidence. The application was based upon a confession of a fellow service man at the Keesler Air Force Base, Airman Bendell Gill, in which Gill confessed to attacking the victim Airman Kilborn on the night in question.

The commanding officer at the Base ordered his Staff Judge Advocate to conduct an ex parte investigation into the merits of this application. After the investigation was complete, and in reliance upon the report, the commanding officer denied the application for the new trial, and approved the findings of the court martial. See opinion of Judge Pollack - 6a-7a; report of the Staff Judge Advocate - 41a-49a; affidavit of Bendell Gill - 39a-40a.

Judge Pollack was obviously disturbed by the failure of the base commanding officer, and his Staff Judge Advocate, to refer this application for a new trial to the military trial judge himself. Colonel

William Gobrecht was the military judge who presided at the trial. He was attached to the Maxwell Air Force Base in Alabama, and travelled to Keesler Air Force Base, Mississippi, to preside at the trial. At no time did Colonel Gobrecht ever see, hear or learn of the new trial application. The application was decided solely by the convening authority, General Madsen, and his Staff Judge Advocate, Colonel Birdsong. See 33a- an affidavit not contested as to these pertinent facts.

In his concern Judge Pollack discussed the issue at great length, noting in part his deep concern that the military authorities had completely ignored the trial judge at this critical stage of the proceedings. In part Judge Pollack wrote (10a, -17a):

> "An analysis of whether the procedures that were utllized in this case satisfy the Constitution though the motion for a new trial was not referred to the trial judge for action must consider how the plaintiff herein would be benefited by having the trial judge act on his motion. The benefits to him seem to be the following:
>
> (a) The trial judge is familiar with the evidence introduced at trial, has been able to judge the credibility of the various witnesses, and is best able to evaluate the possible effect of the new evidence.
>
> (b) The trial judge can be counted upon to be impartial and to utilize fair and effective fact-finding procedures to test the validity of the new evidence."
>
> ********
>
> "Clearly, it is preferable for the judge who heard the evidence at trial, as opposed to another judge, to hear the motion for a new trial, as he thus "may utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion" in making his determination. Brown v. United States, 333 F.2d 723,

724, (2d Cir. 1964). It could be argued that motions for new trials may be permissably heard by someone other than the trial judge only where extraordinary circumstances mandate. Thus, arguably, the military's procedure for deciding new trial motions violated the the accused's right to due process since it precluded a hearing before the trial judge even where such a hearing would be feasible."

****

" The procedure by which the convening authority and the appellate court ascertained or sought to ascertain the factual basis and background for the new trial motion-- the ex parte investigation -- does not comport with generally accepted judicial methods for arriving at the truth. Two omissions present themselves in particular: (1) the failure to hold an evidentiary hearing at which plaintiff could present proofs and for which he would have the benefits of compulsory process, and (2) the failure to allow plaintiff's counsel to cross-examine those witnesses interviewed by the investigator upon whose report both the convening officer and the appellate court relied."

****

" Where a hearing is not held on a new trial motion, judges usually rely upon affidavits or depositions to resolve the factual issues presented. An ex parte investigation by a judge on a motion for a new trial has been characterized as "(s) o fraught with possible injustice and peril to the rights of a party" as tc be reversible error where the investigation partially influenced the judge's decision."

****

" While it may be argued that the failure of the military authorities to utilize normal judicial adversary proceedings in ascertaining the facts behind plaintiff's motion for a new trial is a denial of his right to due process of law guaranteed by the Fifth Amendment, there is no authority to support this proposition directly. The failure to allow plaintiff's counsel to participate in the fact-finding procedure does, however, at least arguably violate plaintiff's Sixth Amendment right to the assistance of counsel under the language of United States v. Wade, 388 U.S. 218, 224 (1967), which interpreted that amendment to require that a criminal defendant's counsel be present

at all "critical stages of the proceedings". (There counsel were required at pre-trial line-ups.) It can be argued that the fact-finding process upon which a motion for a new trial is decided is such a "critical stage".

The argument that the new trial motion should have been considered by the trial judge because of his trial experience and that failure to have the motion considered by the trial judge is thus a violation of due process does not seem convincing in light of the authorities. There is no authority that failure to hold an evidentiary hearing on the motion in these circumstances is a violation of due process, though there is some authority that it would be an abuse of discretion for a judge subject to Rule 33, Fed. R. Crim. P. The argument that the reliance of the decision-makers here upon an ex parte investigation to resolve the factual issues is a denial of due process and a violation of plaintiff's Sixth Amendment right to counsel has superficial plausibility only, since motions for a new trial may be decided without an evidentiary hearing.

While perhaps Judge Pollack's initial instincts were correct, he was in error in his departure from the applicable basic principles of constitutional law. There just does not appear to be any reported opinions on this very issue. Obviously the situation of lack of controlling authorities cuts both ways - either the situation is so widely accepted that no one dares to protest, or the situation is so blatant, that no other base commander ever dared do it. In any event we must confront this problem without the assistance of any specific appellate opinion. On the other hand we can be guided by certain basic principles. The trial judge himself is the sole authority for deciding all pre-trial, in-trial, and post-trial matters relating to the conduct

of the trial itself. It is not for one litigant or another - be he the commanding officer who authorized the charge or the soldier himself who was the defendant - to decide with finality exactly what the other side is entitled to.

It is not for the commanding officer to take any steps which would in any way infringe upon the independence of the trial judge to make all necessary rulings. It is axiomatic that any such of the proceedings dealing with the case should be conducted in court, with the trial judge present, with both parties and their counsel participating, and with a court reporter making a transcript of the proceedings. Only then can we be assured that the ultimate decision was then made by an impartial and neutral officer, after hearing all sides, all witnesses, and all parties.

Obviously this was not done in this particular case. Judge Pollack recognized that while there is not a constitutional right to a new trial application in a criminal case, once that right is granted and recognized, it must be carried out in a manner consistent with due process. 9a. As such while the new trial procedure in the military system is not spelled out with the same clarity as it is in the federal court, it certainly exists as a very definite step which can be utilized in appropriate cases.

Judge Pollack noted that a confession by a third party is such an appropriate instance. 14a-15a.

While Judge Pollack does follow the correct path for the greater part of his discussion, he does take a wrong turn at the very end, and leads himself astray. Judge Pollack writes that an application for a new trial may be denied without an evidentiary hearing - a rule with which I will not contest. From this he argues that inasmuch as the defendant was not constitutionally entitled to an evidentiary hearing on his new trial application, he cannot constitutionally complain that the trial judge was not the one who decided the merits of his application on the strength of his supporting papers. Obviously the second proposition does not follow from the first. It was for the trial judge himself, and not anyone else, to decide whether Lebron was entitled or not to an evidentiary hearing on his application. After all the trial judge might well have wanted to hear Bendell Gill, and see how he held up under cross-examination in open courtroom. Furthermore, even if the trial judge did not want to conduct an evidentiary hearing and take the testimony of Gill, the trial judge may well have considered from the supporting papers alone that they were more than ample to justify the granting of a new trial. Obviously ultimately the contesting issue of fact as to who was the culprit would be decided by the jury, and not by the judge. However, in the first instance it was for the trial judge himself,

and not for anyone else, to decide whether the motion papers together with the supporting affidavit, were sufficiently persuasive as to entitle Lebron to a new trial. Only the trial judge himself could make that decision. As such Judge Pollack has confused the right to hear with the right to decide. The right to hear remains discretionary with the trial judge himself. The right to decide remains exclusively with the trial judge, and is never taken away from him.

At no time did we ask Judge Pollack to rule on the question of whether ultimately Lebron was entitled to a new trial. All we asked that he do was to refer the matter back to the military trial judge for his decision on the application. We do believe that the application of due process standards to this critical stage of the proceedings need not require a finding as to the constitutional deficiency of any statute. Apparently Article 73 of the UCMJ (10USC 873) just does not begin to address itself to this very problem. The Court of Military Review noted this gap at this point - the Code of Military Justice "...is silent as to the method by which he (Lebron) could obtain relief before the first review." 46 CMR at 1065.

There is nothing novel in requiring that the military toe the mark with respect to the due process clause. In DeChamplain v. Lovelace, 510 F.2d 419, 423 (CA-8, 1975), vacated as moot, ____US____, the

Eighth Circuit noted that the due process clause and other constitutional safeguards apply to military trials, except where expressly or by necessity made inapplicable. In that case but within a different context, the Court of Appeals noted the requirement of a neutral trial judge. 510 F. 2d at 426.

In Kauffman v. Secretary of the Air Force 415 F. 2d 991, 997 (CA-DC, 1969), the Court of Appeals for the District of Columbia noted:

> "We hold that the test of fairness (a reference to the Burns v. Wilson full and fair consideration test) regards that military rulings on constitutional rulings conform to Supreme Court standards unless shown that conditions peculiar to military rule require a different rule."

Obviously there is no statute which denies to the trial judge himself the power to decide a new trial application. Furthermore, there is just no military justification for such a procedure. Certainly national security did not foreclose Colonel Gobrecht from travelling approximately two hundred miles from his home base at the Maxwell Air Force Base to the Keesler Air Force Base in Mississippi to preside at such a court session where it involved only argument of counsel or where it included an evidentiary hearing. Alternatively, there is just no reason why the new trial application could not have been mailed to the trial judge at his home base for his consideration on the papers alone. Obviously in considering the moving papers, the trial judge could well recall the

trial testimony itself, and perhaps he did have his own doubts as to the in-court identification, together with the out-of-court identification, of the culprit by the victim. In that regard the trial judge may well have decided to grant a new trial for in his considered judgment, perhaps the issue of identification was genuinely close. Certainly due process requires that the trial judge, and not the convening authority, decide this critical question.

POINT THREE

THE ARTICLE OF THE UNITED STATES CODE OF MILITARY JUSTICE AUTHORIZING CONVICTION BY A VOTE OF ONLY TWO-THIRDS OF THE JURY IS UNCONSTITUTIONAL

In his opinion rejecting Lebron's argument that Article 52 (3) of the UCMJ (10 USC 852) authorizing a conviction by a vote of only two-thirds of the jury is unconstitutional, in view of Mr. Justice Powell's concurring opinion in Johnson v. Louisiana 406 US 356, 366, 369-370 (1972), Judge Pollack wrote (18a-19a):

> "His contention that the conviction must be set aside because he was found guilty by a non-unanimous jury cannot be sustained. Plaintiff points to Johnson v. Louisiana, 406 U.S. 356 (1972), in which the Supreme Court, by a 4-1-4 vote, affirmed the constitutionality of non-unanimous juries in state criminal proceedings. Mr. Justice Powell in concurrence indicated that he would decide differently if the Court were considering federal trials, thus providing a five man majority which would hold non-unanimous federal jury convictions to be unconstitutional. However, Justice Powell predicated his view upon the theory that the Sixth Amendment in its entirety did not apply to the states. The Sixth Amendment right to a jury trial does not apply to military courts, Whelchel v. McDonald, 340 U.S. 122, 127 (1950). Thus it would seem to follow from the view expressed in Johnson that Justice Powell could not be expected to hold that un animous juries are constitutionally required in military courts."

In his concurring opinion in Johnson v. Louisiana 406 U.S. at

369-370, Mr. Justice Powell had written:

> "In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.
>
> ********
>
> "In these cases, the Court has presumed that unanimous verdicts are essential in federal jury trials, not because unanimity is necessarily fundamental to the function performed by the jury, but because that result is mandated by history. The reasoning which runs throughout this Court's Sixth Amendment precedents is that, in amending Constitution to guarantee the right to jury trial, the Framers desired to preserve the jury safeguard as it was known to them at common law? At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial."

The various federal appellate courts have held that thebulk of the Bill of Rights are applicable to court martial proceedings. In fact all such constitutional provisions are applicable, except where expressly or by necessary implication made inapplicable. De Champlain v. Lovelace , 510 F. 2d 419, 423, (CA-8, 1975). Both the Eighth Circuit and the District of Columbia Circuit have held that military rulings on constitutional issues conform to Supreme Court standards, unless it can be shown that conditions peculiar to military life require a different rule. Kauffman v. Secretary of the Air Force, 415 F. 2d 991, 997, DeChamplain v.

Lovelace, Supra, at 423.

In Parker v. Levy, 417 U.S. 733, in dissent, Mr. Justice Douglas wrote:

> "So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for a presentment or indictment of a grand jury in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger".

In court martial proceedings we do have a trial by jury, even if the jury is drawn from the military community and not from the general population at large. While perhaps Reid v. Covert (354 US 1) does not compel an indictment by a grand jury, or even a trial by a civilian jury, it still does not answer the number argument - is unanimity of jurors to be the rule in all federal prosecutions be it civilian or military?

The opinion of the High Court in Johnson v. Louisiana 406 U.S. 356 is less than two years old, and represents the first judicial expression in this area. The issue of unanimity against two-thirds jury vote has not been specifically considered by any court. However, the thrust of the various opinions of the High Court in Johnson v. Louisiana evidences that unanimity of a jury in a federal criminal prosecution is a basic concept of the Bill of Rights. The entire thrust of the jurisprudence of court martial proceedings is that the Bill of Rights concepts should be applied, except in the one or two very specific situations where it is just impossible.

The issue of unanimity does not present the problem which would put it within the exception to the general rule.

Judge Pollack's reliance upon a 1950 case - Whelchel v. McDonald - to the effect that jury trial does not apply to military courts, is ancient history and just not accurate today. Likewise 51 and 52 of the UCMJ (10USC 851 and 852) specifically deal with the right to trial by jury. While perhaps it may not be necessary to secure a jury of civilians, there has certainly been no problem over the years in the military securing military jurors for court martial trials. Perhaps the community involved is somewhat different from the community from which the federal court draws its jury. Nevertheless, it remains very much a well defined community of one's peers.

There is just no compelling military reason why the prosecution should not be put to the burden which the situation places upon the United States Attorney - that he convince all jurors, and not just two-thirds, if he wishes to prevail.

POINT FOUR

THE SEARCH AND SEIZURE UTILIZED IN THE NARCOTIC CASE TO SECURE THE DRUGS IN QUESTION IS UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE IT WAS MADE SOLELY ON THE BASIS OF ORAL AND UNSWORN REPRESENTATIONS OF THE INVESTIGATING AGENT

On August 27th, 1970, the Senior Vice Commander of the Keesler Technical Training Center authorized in writing a search of the person of the plaintiff, and authorized a search of narcotics, dangerous drugs, and associated paraphernalia. See copy of the authority to search and seize - 50a.

The authority to search and seize was made on the basis of oral and unsworn representations of Special Agent Latternee N. Montague, Jr. that plaintiff was in possession of narcotics, in violation of law. Pursuant to the said authority to search and seize, Special Agent Latternee N. Montague, Jr. did search the person and premises of the plaintiff, and did seize the narcotic drug.

At the trial the narcotic drug so seized was introduced into evidence, and its possession by the plaintiff was the basis of a court martial conviction of the plaintiff.

Apparently military law, as evidenced by decisions of the military appellate courts, permits an authority to search and seize (analagous to a search warrant) to be secured on the basis of oral and unsworn representations, and need not be done on the basis of written and sworn representations. U.S. v. Hartzook, 15 USCMA 291, 35 CMR 263 (1965); U.S. v. McFarland, 19 USCMA 356, 41 CMR 356 (1970); U.S. v. Penman, 16 USCMA 67, 36 CMR 223 (1966). Judge Pollack relied solely upon these military opinions, and did not discuss the broader constitutional issues involved. 5a.

However, in numerous cases, the Supreme Court of the United States has made it crystal clear that the procedure to be followed in securing and executing a search warrant are constitutionally in toto. In order to sustain a search warrant, it is necessary that the appropriate party toe the mark in meeting the requirements of the Fourth Amendment. The names of these High Court decisions are legendary, - Coolidge (403 U.S. 443), Harris (403 USC 573), Spinelli, (393 U. S. 410), Aguilar (378 U. S. 108), and Ventresca (380 U.S. 102).

Every day district courts and courts of appeal are struggling with the problem of determining the sufficiency of an affidavit submitted in support of search warrants. Requirements are stringent and are designed to meet constitutional standards, which have in mind the protection of the right to

privacy. The Constitution is completely ignored by the military which makes no requirement that an affidavit or sworn statement be submitted in order to secure authority to search and seize.

CONCLUSION

Each of the issues presented by this appeal are properly before this Court, and are ripe for adjudication. Each of these issues was fully discussed by the district court.

Basically court martial proceedings are subject to the same constitutional procedural requirements as are criminal proceedings in the federal district court. Exceptions are very few indeed, and require military or compelling justification to exist and to continue. None of the issues presented in this appeal can justify a compelling military exception.

We submit that in everal instances in both trials, Lebron was denied his due, and inasmuch as redress has not come forth from any of the courts below, it is within the province of this Court to take corrective action.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

LUIS A. LEBRON, JR.,

Appellant,

- against -

THE U.S. SECRETARY OF THE AIR FORCE,

Appellee,

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the **11th** *day of* **August** *19* **75** *at* **1 St. Andrews Pl., N.Y., N.Y.**

deponent served the annexed Print *upon*

Paul J. Curran

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this
day of *19*

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977